



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9
75 Hawthorne Street
San Francisco, California 94105

May 22, 2019

Mr. David Kimball
Gallagher & Kennedy
2575 E. Camelback Road, Suite 1100
Phoenix, Arizona 85106-9225

Dear Mr. Kimball:

On March 5, 2019, you wrote the Environmental Protection Agency (EPA) regarding Roosevelt Irrigation District's (RID's) and Gallagher and Kennedy (G&K's) remediation proposal for the West Van Buren WQARF Site. Your March 2019 letter requests that EPA add the Arizona Department of Environmental Quality (ADEQ) West Van Buren WQARF Site to EPA's Motorola 52nd Street National Priorities List (NPL) Site and concur with the remediation plan proposed by RID/G&K. You also request a meeting with EPA leadership. Your March 2019 letter reiterates demands made in your previous correspondence of March 15, April 18, May 16, and May 29, 2018, as well as your July 19, 2018 letter. EPA Region 9 responded to your previous correspondence with letters on June 18, 2018, and September 26, 2018. My staff and I also met with you and listened to G&K's presentation regarding the RID/G&K proposal on March 13, 2018.

As noted in my September 26, 2018 letter, Region 9 is evaluating ADEQ's April 2018 request that EPA either extend the Motorola 52nd Street Superfund Site into the West Van Buren WQARF Site or evaluate West Van Buren for listing on the NPL. It would not be productive for EPA to meet to discuss the RID proposal while EPA is still evaluating ADEQ's request.

If EPA agrees to address West Van Buren under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), EPA may be able to benefit from the competing Remedial Investigations/ Feasibility Studies (RI/FSs) and proposed remedial action plans (PRAPs) submitted by RID and the West Van Buren Working Group. However, EPA would follow the statute and National Contingency Plan (NCP) before selecting a remedy for West Van Buren. *See*, 40 C.F.R. § 300.430 and CERCLA Section 121 (setting forth the requirements that EPA must follow to select remedies at NPL Sites.)

EPA would seek input from the stakeholders to determine the appropriate remedy and who should implement it. The stakeholders include the West Van Buren Working Group, the Salt River Project, the City of Phoenix, RID, and the public. All stakeholders would have the opportunity to comment on the proposed remedy and EPA would take the comments into consideration before selecting the remedy as required under CERCLA and the NCP.

EPA's approval of the Motorola 52nd Street Record of Decision (ROD) in 1988 is not analogous to your proposal for West Van Buren as suggested in your March 2019 letter. At the time the Motorola 52nd Street ROD was approved in 1988, the Motorola 52nd Street Site had already been proposed to the NPL and ADEQ was addressing the Site as the lead agency under CERCLA. *See, 53 Federal Register 23978 (June 24, 1988).* EPA's concurrence on ADEQ's 1988 proposed ROD was pursuant to CERCLA and the NCP. *See, September 30, 1988 Declaration by Regional Administrator Daniel McGovern* (concurring with the ADEQ proposed remedy pursuant to CERCLA and the NCP.)

ADEQ has addressed West Van Buren pursuant to its WQARF authority for decades and has not requested that EPA concur on an ADEQ-approved remedy for West Van Buren pursuant to CERCLA. Although ADEQ approved RID's early response action pursuant to its WQARF authority, as noted in your March 13, 2018 presentation, ADEQ was unwilling to choose between the June 2015 PRAP submitted by RID and a competing December 2015 PRAP submitted by the West Van Buren Working Group. *See, February 8, 2016 Letter from ADEQ to RID and the WVBWG* (requesting that both RID and the West Van Buren Working Group withdraw their proposed PRAPs submitted pursuant to WQARF).

Your March 2019 letter mischaracterizes RID/G&K's proposal as having been determined by a court to be substantially in compliance with the NCP. Although the District Court may have found RID's past costs were incurred in a manner that "substantially complied with the NCP," it did not evaluate whether the proposed RID/G&K remedy is consistent with the NCP. A determination that past costs in a private party action are consistent with the NCP has no bearing on NCP compliance for future work.

EPA is required to comply with CERCLA and the NCP irrespective of any findings a district court may have made regarding NCP compliance for past costs incurred by a private party. Thus, if EPA agrees to address West Van Buren under CERCLA, EPA will complete an RI/FS, issue a proposed plan for public comment, and issue a ROD. *See, 40 C.F.R. § 300.430 and CERCLA Section 121* (setting forth the requirements that EPA must follow to select remedies at NPL Sites.)

Your March 2019 letter alleges that the Arizona Department of Water Resources (ADWR) is improperly withholding approval of the "ADEQ approved NCP compliant" RID/G&K proposal and insists that EPA should approve it so that RID can rely upon the permit exemption under CERCLA. EPA does not have a position regarding the end use of RID's water, but EPA disagrees with your characterization of how the permit exemption would impact the ongoing dispute if EPA were to address the West Van Buren WQARF Site under CERCLA. On page 11 of your March 2019 letter, you state:

If ADWR had issued a PQGWP [Poor Quality Groundwater Withdrawal Permit] to implement the ADEQ approved and NCP-compliant RID groundwater remedial action ... there would be no need for EPA's involvement in the WVBA WQARF Site ...

In other words, your March 2019 letter asserts that EPA involvement would allow RID/G&K to rely upon the permit exemption under CERCLA to authorize what ADWR has refused to permit.

However, EPA would not utilize the permit exemption under CERCLA, or condone RID/G&K doing so, to attempt to preempt the ongoing dispute regarding the appropriate end use of the water. EPA would evaluate the remedial alternatives pursuant to the nine criteria in the NCP as part of the RI/FS, including implementability, and would seek input from all stakeholders about the proposed remedy and the appropriate end use of the water. *See* 40 C.F.R. § 300.430(e)(9). The permit exemption allows EPA to avoid the delays associated with obtaining a permit for an on-site remedy that has been selected pursuant to CERCLA and the NCP, but does not support one end use over another.

As noted in my September 26, 2018 letter, CERCLA does not mandate the end use of the water or provide water rights. Two of the criteria that EPA considers in selecting remedies are implementability and state acceptance. *See*, 40 C.F.R. § 300.430(e)(9)(iii)(F&H). The RID/G&K proposal includes pumping water from RID's irrigation wells, treating it, and serving it as drinking water to municipal and industrial customers outside of RID's service area. Since RID is an irrigation district, this requires approval from state agencies and has resulted in multiple lawsuits and other actions being initiated by RID/G&K 1) to attempt to obtain approval for RID to provide municipal water to end users outside of RID's service area; 2) to determine the duration of RID's right to continue to pump water pursuant to contracts from the 1920s, as amended; and 3) to seek reimbursement for costs incurred by RID or G&K under CERCLA. Since G&K is funding the RID remediation proposal on a contingency fee basis, with payment to come from the proceeds from the sale of water to new municipal customers, G&K filed a lawsuit to recover its own costs after the District Court found that RID could not recover costs incurred by G&K. *See, Roosevelt Irrigation Dist. v. Salt River Project Agric. Improvement and Power Dist.*, 222 F. Supp. 3d 757, 774-75 (Nov. 22, 2016) (holding that RID cannot recover G&K costs); and *Gallagher & Kennedy v. City of Phoenix, et. al.*, (D. Ariz.), Sept. 12, 2018, 2018 WL 6174041 (containing G&K's motion for summary judgment against City of Phoenix, Maricopa County, and Prudential Overall Supply).

EPA does not have an interest in or a position regarding any of the RID/G&K litigation; however, EPA would have to make sure that any remedy proposed under CERCLA is implementable and that the party proposing to implement it has the financial resources to do so. If EPA were to evaluate the RID/G&K proposal as a remedial alternative pursuant to the nine criteria under the NCP, the uncertainty associated with the ability of RID/G&K to fund and implement the proposal would have to be evaluated as part of analyzing the RID/G&K alternative.

The NCP also requires the EPA to seek state concurrence on the proposed remedy and give the state the opportunity to comment on the proposed plan. *See*, 40 C.F.R. § 300.515(e)(setting forth the NCP requirements for state involvement in the selection of a remedy). Finally, CERCLA requires parties implementing remedial actions pursuant to settlements at Superfund sites to enter into a consent decree, which requires Department of Justice participation and approval. *See*, CERCLA Section 122(d). CERCLA consent decrees

also require the parties performing the work to provide adequate financial assurance to fund the remedy. See, https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=81 (providing links to the model remedial design/remedial action (RD/RA consent decree), as well as EPA's financial assurance guidance discussing acceptable methods of financial assurance).

Your March 2019 Letter asserts that an early response action is necessary to protect the environmental justice community that is being impacted by the contamination from RID's wells. However, the data that EPA has evaluated to date and the information provided by ADEQ, including risk characterization done by both RID/G&K and the West Van Buren Working Group, does not support the need for an early response action by EPA to address immediate risks to human health and the environment at West Van Buren.

The investigations done at the West Van Buren WQARF Site have determined that the contamination is not currently impacting anyone at levels that would warrant an early response action by EPA at this time. The Arizona Department of Health Services ("ADHS") performed a Health Consultation to evaluate the risks posed by RID's groundwater. See, *ADHS Health Consultation, Evaluation of Water Sampling Results in the Roosevelt Irrigation District (RID)*, January 8, 2015. The ADHS Health Consultation concluded the following:

"RID irrigation wells and canal water: This health consultation evaluated the potential health risks associated with the exposure to groundwater collected from RID irrigation wells and canal water collected in the RID area. **With the available information, ADHS concluded that ingestion exposure to TCE and PCE in groundwater and canal water in RID sampling area is not expected to harm people's health.**"

See, *ADHS Health Consultation*, page 3.

The ADHS Health Consultation is consistent with the other studies to date that do not suggest a need for an early response action by EPA at this time. For example, the PRAP done by RID/G&K found the following with respect to potential impacts to the community from volatilized contaminants from groundwater or the RID canals:

- 1) "This PRAP, consistent with the *RID FS Report*, does not address vapor intrusion issues due to observed depth to groundwater in the WVBA Site, which minimizes the potential for vapor migration to land surface...";
- 2) "Water quality data obtained by sampling and analysis of VOCs in RID water supply systems document the occurrence of TCE and PCE at levels safely below numeric limits established for Arizona Surface Water Quality Standards for dermal exposure by partial and full body contact during bathing and swimming in the open RID laterals and canals as well as ingestion of fish caught in these waterways..."; and
- 3) "The findings indicate concentrations of target COCs in ambient air are less than screening-level guidelines for acute and sub-acute exposures developed by ADHS and ATSDR. As such, it is reasonable to conclude that the current air emissions from

RID water supply well discharges and water supply conveyance do not pose an acute risk to public health.”

See Proposed Remedial Action Plan, prepared on behalf of RID by Synergy Environmental LLC, June 2015, pages 15, 42-44. EPA also understands that RID/G&K removed the carbon treatment controlling vapor releases from RID’s wells as part of the early response action because RID determined it was no longer necessary. EPA assumes that RID/G&K would not stop treating volatiles being released from its wells if it posed a risk to the surrounding community. If you have any data that indicates that people are being exposed to unsafe levels of VOCs from RID’s wells, please provide it to ADEQ and EPA.

Due to the location of the pipelines and canals as well as the VOC concentrations in the air downgradient from RID’s wells, the data does not support the need for an early response action by EPA at this time. If EPA agrees to address the West Van Buren WQARF Site under CERCLA, EPA will evaluate how to address the transfer of contaminants from the groundwater to the air from RID’s wells and pipelines as part of the RI/FS.

As noted in your March 2019 letter, the July 25, 2017 Superfund Task Force Recommendations include seeking to leverage third-party resources to clean up NPL sites as well as using interim actions where appropriate to expedite cleanups. However, the West Van Buren WQARF Site is not an NPL Site and EPA is still in the process of evaluating ADEQ’s request to address West Van Buren under Superfund. If EPA agrees to address West Van Buren under CERCLA, Region 9 would do what it can to expedite the cleanup and would be open to RID/G&K participation if it would expedite the remediation. However, the RID/G&K proposal may not be a good candidate for an early response action because the proposal is 1) dependent on the outcome of various lawsuits, 2) embroiled in a dispute with ADWR over the end use of the water, and 3) vigorously opposed by other stakeholders in the area.

To summarize, until EPA evaluates the West Van Buren WQARF Site for NPL listing or as an additional operable unit for the Motorola 52nd Street Site, it is premature to enter into agreements with any party to conduct work on EPA’s behalf, particularly remedial groundwater work. Thus, it would not be constructive for EPA leadership to meet with RID/G&K at this time.

We will update you when we respond to ADEQ’s request. If you have any questions, please contact Dustin Minor in our Office of Regional Counsel at minor.dustin@epa.gov or (415) 972-3888. Mr. Neese may contact me or Angeles Herrera, Assistant Director, at herrera.angeles@epa.gov or (415) 972-3144.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Enrique Manzanilla', written over a horizontal line.

Enrique Manzanilla, Director
Superfund Division

Enclosures: *53 Federal Register 23978 (June 24, 1988)*
 September 30, 1988 Declaration by Regional Administrator Daniel
 McGovern
 February 8, 2016 Letter from ADEQ to RID and the WVBWG

cc: Donovan Neese, Superintendent, Roosevelt Irrigation District
 Misael Cabrera, Director, Arizona Department of Environmental Quality
 Thomas Buschatzke, Director, Arizona Department of Water Resources